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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re MAGDALENO C., a Person Coming Under
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

MAGDALENO C.,

Defendant and Appellant.

F037818

(Super. Ct. No. 503183)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. Nancy
Williamsen, Judge.

Mark L. Christiansen, under appointment by the Court of Appeal, for Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Jo Graves, Assistant Attorney General, Louis M. Vasquez and Robert P.
Whitlock, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Vartabedian, Acting P.J., Levy, J. and Cornell, J.

The juvenile court found true the allegations in the Welfare and Institutions Code section 602 petition that appellant Magdaleno C. committed forcible rape, forcible oral copulation, and sexual battery. (Pen. Code, §§ 261, subd. (a)(2), 288a, subd. (c)(2), & 243.4, subd. (a).)¹ Magdaleno, asserting the encounter was consensual, argues there is not substantial evidence that he used force or restraint against the victim, 15-year-old L.² We find no error and affirm the disposition.

FACTUAL AND PROCEDURAL SUMMARY

L. spent most of the day in question with her girlfriend, F. At about 3:00 p.m. L. and F. visited F.'s male friends, A. and G. Around 7:15 p.m. L. and F. went out to try and find another friend, J.³ They had spoken to J. earlier that day and had promised to return. No one was home when they arrived at the house at which J. had been. On the way home, they stopped and visited with A. and G. in the front yard of A.'s house. During the conversation, Magdaleno and M. rode up on their bicycles. The six people went inside A.'s house.

A. suggested that L., F. and Magdaleno join him in his bedroom to listen to music. After they entered the bedroom, A. shut off the light and shut the door. A. and F. started kissing on the bed.

L. sat on the bed and Magdaleno put his arms around L.'s waist and laid her on the bed. Magdaleno began kissing L.'s forehead and the side of her face and fondling her breasts. L. told Magdaleno she did not want to because she was waiting until she got married. Magdaleno replied that he knew what he was doing and it would be all right.

¹ All statutory references are to the Penal Code unless otherwise indicated.

² We refer to the victim as L. and the other juveniles by initials, not out of disrespect, but to protect their identities.

³ The defense attempted to impeach L. by introducing evidence from F. that J. did not exist and was made up to receive permission from L.'s mother to leave the house.

Magdaleno pushed L.'s shirt up and pulled her bra down and kissed her breasts. L. pushed Magdaleno's hands away when he put his hands inside her shorts. L. again told him she did not want to have intercourse. Magdaleno moved on top of L. and pushed her shorts and panties to the side. His pants were around his knees. He put his penis inside L.'s vagina. L. told Magdaleno that she did not want to have intercourse and that it was hurting her. L. pushed him away, got off the bed and stood by the closet.

A. left the bedroom to go to the bathroom. Magdaleno started kissing F. on the bed. L. stayed by the closet not knowing what to do. She knew M. and G. were in the living room, A. was in the bathroom, and F. was still on the bed with no intention of leaving. Magdaleno suggested to A. that they switch partners when A. returned, but A. refused. A. began kissing F. again, and Magdaleno pulled L. back on the bed.

Magdaleno put his hands on the side of L.'s face and put his penis near her mouth. L. had recently incurred an injury to her head and it hurt when Magdaleno put his hands on her head. L. opened her mouth and Magdaleno inserted his penis. Magdaleno moved L.'s head back and forth with his hands.

L. pushed her head away from Magdaleno and buried her head in his shirt because she did not want him to see her cry. Magdaleno said it was all right, and got on top of L. L. said she did not want to have intercourse. Magdaleno started taking her shorts off. L. said she was afraid. Magdaleno said not to worry. L. asked Magdaleno if he had protection, and he replied that he knew what he was doing and it would be all right. Magdaleno pulled L.'s shorts down and inserted his penis in her vagina. L. said it hurt and told him to stop. Magdaleno continued. When A. and F. were finished, A. got off of F. and Magdaleno got off of L. Magdaleno pushed L. down when she tried to get up and got back on top of her. A. and F. told Magdaleno to stop. Magdaleno got up when he finished. L. left and F. followed her.

Magdaleno did not hit or threaten L. The only physical restraint used by Magdaleno was when he pulled L. onto the bed. L. could have left the room, but stayed

because she did not know what to do. Nor did L. attempt to hit or injure Magdaleno. L. did not say anything to F. while in the bedroom, nor did L. say anything to M. and G. when she left the house.

A. testified that he never heard L. scream or indicate that she did not want to have intercourse with Magdaleno. Nor did he hear L. say she was in pain. A. saw L. remove some part of her clothing, although he was unsure what she removed.⁴

M. and G. both testified that they did not hear any unusual noises when Magdaleno, L., A. and F. were in the bedroom.

The next day L. told her brother what had happened. Her brother saw Magdaleno riding his bike and confronted him. A fight occurred and the police responded to the fight. L. reported the rape to the responding officers. L. was taken to the hospital and a rape examination was performed. There was a bruise on her inner thigh.

Dr. Murrieta was the emergency room physician who performed the rape examination on L. He does not consider himself an expert on sexual assaults. He observed in the examination vaginal lacerations from sexual intercourse which were indicated on his report. These lacerations could have been the result of a woman having intercourse for the first time. He did not see any bruising nor did he observe any tearing of the vagina on visual examine. There was tenderness on the interior of the L.'s leg. His findings were consistent with trauma to the genitalia, although not necessarily indicating rape.

Dr. Nancy Brown is the chief of the Pediatric Forensic Facility Mental Group and the Health Services Agency. She performs sexual abuse examinations for court purposes

⁴ We reject Magdaleno's argument that the juvenile court found A. not credible "for the wrong reason." The argument is not supported by pertinent authority and is waived. (*People v. Crittenden* (1994) 9 Cal.4th 83, 153.) Moreover, we have reviewed A.'s testimony. A. contradicted himself on several occasions, changed his testimony, and was not believable.

on pediatric and adolescent patients. She has received special training in sexual abuse of children and adolescents.

Dr. Brown reviewed the emergency room report prepared by Dr. Murrieta. The report noted a laceration to the hymen and three tears on the posterior forshette.⁵ The tear in the hymen is consistent with penetration of the hymen, but it is unclear if the penetration was forceful. The three tears in the posterior forshette were fairly significant and caused by forceful penetration. The tears would not normally occur after consensual intercourse. Dr. Brown also felt that visual examination of the vagina would not reveal any injuries except major lacerations.

DISCUSSION

Magdaleno raises two challenges to the sufficiency of the evidence of the forcible rape and the forcible oral copulation allegations. The first is that he had a reasonable and bona fide belief that L. consented to the acts. The second is that he did not use force sufficient to violate either statute. In addition, Magdaleno contends there was no evidence of restraint to support the sexual battery allegation.

A. Standard of Review

When the sufficiency of the evidence is challenged on appeal, “the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value” (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We presume the existence of every fact the trier of fact could reasonably deduce from the evidence that supports the judgment. (*People v. Rayford* (1994) 9 Cal.4th 1, 23.) We do not reweigh or reinterpret the evidence; rather, we determine whether there is sufficient evidence to support the inference drawn by the trier of fact. (*People v. Perry* (1972) 7 Cal.3d 756,

⁵ The posterior forshette is the area between the vaginal entrance and the anus.

785; overruled on other grounds in *People v. Green* (1980) 27 Cal.3d 1.) The same standard applies to both adult and juvenile cases. (*In re Roderick P.* (1972) 7 Cal.3d 801, 809.)

B. There is Substantial Evidence of Forcible Rape and forcible Oral Copulation

Section 261, subdivision (a)(2) proscribes sexual intercourse with a person who is not the defendant's spouse “[w]here it is accomplished against a person’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.” Section 288a, subdivision (c)(2) proscribes any “act of oral copulation when the act is accomplished against the victim’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person”

There is no evidence in the record that Magdaleno used violence, duress, menace, or threats during his encounter with L. Magdaleno argues that the acts were consensual and there is no evidence that he used force. The People assert there was substantial evidence that Magdaleno used force relying on the testimony that Magdaleno (1) pulled L. from a sitting position to a prone position on the bed, (2) put his hands on L.’s head and moved her head back and forth during the act of oral copulation, and (3) pulled L. when she was standing in front of the closet back to the bed. The People also rely on the testimony from Dr. Brown that the tears to L.’s posterior forshette were consistent with forcible intercourse.

1. Consent

If a defendant entertains a reasonable and bona fide belief that the victim consented to the intercourse, the defendant is not guilty of rape because he lacked the mental state required by section 20. (*People v. Mayberry* (1975) 15 Cal.3d 143,155.) Because the defense is based on a mistake of fact, the defendant’s mistaken belief the victim consented to the intercourse, the defense is viable only if there is substantial evidence of equivocal conduct by the victim that would have led the defendant to

reasonably and in good faith believe that consent existed where it did not. (*People v. Williams* (1992) 4 Cal.4th 354, 362.) Both *Mayberry* and *Williams* held that with appropriate circumstances, a jury should be instructed on the defense of a good faith belief in consent.

Had this been a jury trial, Magdaleno would have been entitled to a *Mayberry* instruction. There was substantial evidence of equivocal conduct by L. that could have led Magdaleno to believe she consented to the acts. However, the juvenile court heard the matter without a jury. (*People v. Superior Court (Carl W.)* (1975) 15 Cal.3d 271, 285.) Our review is limited to whether the record contains substantial evidence that L. adequately informed Magdaleno that she did not consent to the actions.

L. testified that before and after the oral copulation and before the intercourse she told Magdaleno that she did not want to be sexually involved with him. That she did not yell, scream, or fight is of no import. At no time did L. agree to have sexual relations with Magdaleno. While her actions may have been equivocal, her words were not. Thus, there is substantial evidence that L. informed Magdaleno that she did not consent to the intercourse.

2. Force

A more difficult issue is whether Magdaleno used sufficient force to violate the statutes. In *People v. Cicero* (1984) 157 Cal.App.3d 465 the defendant was convicted of committing a lewd or lascivious act on a child through the use of force. The trial court found there was no violence or threat of great bodily harm, but found that sufficient force was used when the defendant picked up the two girls by the waist in a playful manner and placed his hand on their crotches while carrying them. The girls initially thought that the defendant was playing with them and did not resist when he picked them up.

The appellate court rejected defendant's contention that no force was used. (*People v. Cicero, supra*, 157 Cal.App.3d at p. 474.) When it is alleged force was used and there is no physical harm to the child "it is incumbent upon the People to prove that

the defendant used physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself. [Citation.]” (*Ibid.*) The appellate court concluded the People met this burden. “[D]efendant’s acts of picking the girls up and carrying them along were applications of physical force substantially different from *and* substantially greater than that necessary to accomplish the lewd act of feeling their crotches.” (*Ibid.*)

Cicero was followed in *People v. Pitmon* (1985) 170 Cal.App.3d 38, where the defendant was charged with use of force in the molestation and oral copulation involving a young boy. Defendant held the boy’s hand during the extended incident, and placed the boy’s hand on his genitals and moved it back and forth. In addition, when defendant had the boy orally copulate him, defendant pushed the boy’s head back during the act. The appellate court found these acts sufficient to constitute a use of force. (*Id.* at p. 48.)

In *People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1307, the appellate court held sufficient evidence of physical force existed where the defendant pulled the children by the hand when they attempted to refuse his requests and pulled the children’s heads forward during the act of oral copulation.

In *People v. Bergschneider* (1989) 211 Cal.App.3d 144, 153-154, sufficient evidence of rape accomplished by the use of force or fear existed where the defendant pushed the victim’s hands away from her vagina so that intercourse could occur and the victim was afraid of the defendant because he had previously beaten the victim’s brother.

This line of authority was broken by two opinions from the Sixth Appellate District, *People v. Schulz* (1992) 2 Cal.App.4th 999, and *People v. Senior* (1992) 3 Cal.App.4th 765. The appellate court held in these cases that “[s]ince ordinary oral copulation and digital penetration almost always involve some physical contact other than genital, a modicum of holding and even restraining cannot be regarded as substantially different or excessive ‘force.’...” (*People v. Senior, supra*, 3 Cal.App.4th at p. 774; see also *People v. Schulz, supra*, 2 Cal.App.4th at p. 1004.) However, the

judgments in both cases were affirmed as the appellate court found the acts of the defendants were sufficient to constitute duress under the statute. (*People v. Schulz, supra*, 2 Cal.App.4th at p. 1005; *People v. Senior, supra*, 3 Cal.App.4th at pp. 775-776.)

Schulz and *Senior* were rejected in *People v. Babcock* (1993) 14 Cal.App.4th 383 and *People v. Neel* (1993) 19 Cal.App.4th 1784. In *Babcock*, the defendant grabbed the victims' hands and forced the victims to touch his genitals; when one victim attempted to pull her hand away, defendant overcame her resistance. The appellate court concluded that the flaw in the analyses in *Schulz* and *Senior* "is in their improper attempt to merge the lewd acts and the force by which they were accomplished *as a matter of law*. Unlike the court in *Schulz*, we do not believe that holding a victim who was trying to escape in a corner is necessarily an element of the lewd act of touching her vagina and breasts. Unlike the court in *Senior*, we do not believe that pulling a victim back as she tried to get away is necessarily an element of oral copulation. And, unlike the defendant in this case, we do not believe that grabbing the victims' hands and overcoming the resistance of an eight-year-old child are necessarily elements of the lewd acts of touching defendant's crotch." (*People v. Babcock, supra*, 14 Cal.App.4th at p. 388.)

The *Neel* court concluded "that defendant's acts of forcing the victim's head down on his penis when she tried to pull away and grabbing her wrist, placing her hand on his penis, and then 'making it go up and down' constitute force within the meaning of subdivision (b) in that defendant applied force in order to accomplish the lewd acts without the victim's consent." (*People v. Neel, supra*, 19 Cal.App.4th at p. 1790.)

Faced with this resounding criticism, a different panel of the Sixth Appellate District rejected *Schulz* and *Senior* in *People v. Bolander* (1994) 23 Cal.App.4th 155.

"Here, the force defendant used on Ryan to accomplish the act of sodomy is no greater than that used to hold a crying victim who was trying to escape in a corner or that used to pull and hold a victim's shoulders to prevent her from resisting. However, in light of convincing criticisms set forth in *Babcock* and *Neel*, we respectfully disagree with the interpretation of the 'force' requirement of section 288, subdivision (b) discussed in

Schulz and *Senior*. We instead join those courts which have held that “[i]n subdivision (b), the element of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person is intended as a requirement that the lewd act be undertaken without the consent of the victim. [Citation.] As used in that subdivision, “force” means “physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself.” [Citations.]” [Citation.] Applying this standard to the facts at hand, we conclude that defendant's acts of overcoming the victim's resistance to having his pants pulled down, bending the victim over, and pulling the victim’s waist towards him constitute force within the meaning of subdivision (b) ‘in that defendant applied force in order to accomplish the lewd act[] without the victim’s consent.’ [Citation.]” (*Id.* at pp. 160-161.)

Magdaleno relies on *Schulz* and *Senior* to support his argument that the force used was insufficient. To the extent these cases are viable authority for the proposition advanced by Magdaleno, we join in rejecting them.

The remaining cases establish that Magdaleno’s actions in pulling L. into a prone position, holding her head during oral copulation, and pulling L. onto the bed when she was standing in front of the closet constitutes substantial evidence of force sufficient to violate sections 261, subdivision (a)(2) and 288a, subdivision (c)(2).

C. There is Substantial Evidence of Sexual Battery

Magdaleno contends there is not substantial evidence of sexual battery. Sexual battery occurs when “[a]ny person [] touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse” (§ 243.4, subd. (a).) Magdaleno asserts there was insufficient evidence of the restraint required by section 243.4, subdivision (a) when he fondled L. breasts.

The parties agree that this court’s decision in *People v. Grant* (1992) 8 Cal.App.4th 1105 is dispositive, but predictably disagree on the outcome compelled by *Grant*. The issue in *Grant* was whether the unlawful restraint required by section 243.4, subdivision (a) required physical restraint, or could be accomplished by assertion of

authority. *Grant* held that improper assertion of authority constituted unlawful restraint sufficient to violate section 243.4, subdivision (a).

Here, there was no authority asserted which could constitute unlawful restraint. Once again, the People rely on the act of Magdaleno pulling L. to a prone position when she was sitting on her bed and the “coercive atmosphere” which existed in the bedroom.

While we give no weight to the “coercive atmosphere” in which L. placed herself, we do find that the force used by Magdaleno in pulling L. onto her back is sufficient to constitute unlawful restraint as required by section 243.4, subdivision (a). As this court stated in *People v. Arnold* (1992) 6 Cal.App.4th 18, 28, “[A] person is unlawfully restrained when his or her liberty is being controlled by words, acts or authority of the perpetrator aimed at depriving the person’s liberty, and such restriction is against the person’s will;... The ‘unlawful restraint required for violation of section 243.4 is something more than the exertion of physical effort required to commit the prohibited sexual act.’ [Citation.]” When Magdaleno pulled L. onto her back, the restraint used was something more than that required for the sexual battery. Thus, substantial evidence supports the allegation of sexual battery.

DISPOSITION

The disposition is affirmed.